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No. 97-1520

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AT&T CORP., *et al.*
Petitioners,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

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In their responses, the state commissions ("NARUC") and the incumbent local exchange carriers ("LECs") contend that the instant petitions should not be granted and consolidated with *AT&T Corp.* v. *Iowa Utilities Board*, No. 97-826 ("*Iowa Utilities Board*"), but rather should only be held pending decision in that case. Their claims rest on a single premise: that the Court will never need to grant plenary review of the Eighth Circuit's mandamus decision no matter what the outcome in *Iowa Utilities Board*. If the Court reverses the Eighth Circuit on the jurisdictional issue presented in *Iowa Utilities Board*, they point out, the writ of mandamus will then certainly have to be vacated. Conversely, they contend, if the Court affirms the Eighth Circuit on that jurisdictional issue, then the mandamus decision "would be plainly correct" and "the petitions accordingly should be denied." LECs, p. 2; *see also* NARUC, p. 5. While the first proposition is accurate, the second assuredly is not.

Even if the FCC does not have jurisdiction to bind state commissions on pricing issues in arbitrations under §§ 251 and 252 of the Act, § 271 expressly gives the FCC the authority to review a BOC's prices in evaluating an application to provide long-distance service that is "typically *interstate*." See *SBC Communications, Inc.* v. *FCC*, No. 97-1425, 1998 U.S. App. Lexis 5276 (D.C. Cir. March 20, 1998), slip op. at 12-13 (emphasis in original). This is the same responsibility that was exercised by federal authorities, and not state authorities, under the AT&T Consent Decree prior to the Telecommunications Act of 1996, and it is entirely consistent with the terms, structure, and purposes of that Act for it to continue to be a matter of federal responsibility. This petition thus presents an issue of immense national importance that the Eighth Circuit will have decided incorrectly -- and in conflict with the D.C. Circuit's subsequent decision in *SBC Communications* -- even if the Eighth Circuit's earlier holding stripping the FCC of

jurisdiction to adopt pricing rules applicable to state arbitration decisions is affirmed. And even the oppositions do not dispute that unless certiorari is granted now, the Court will be presented with the same issue through emergency stay applications instead, and that consideration of that issue at the same time as *Iowa Utilities Board* would present no incremental burden in light of the fact that the Court will be considering § 271 at that time in any event.

1. The suggestion that the Court would have no independent issue to decide in reviewing the mandamus decision if it affirmed the Eighth Circuit's prior holding on jurisdiction over state arbitrations is preposterous. While we believe it is clear that the prior jurisdictional decision is incorrect, it is also clear that even if § 252 of the Act expressly denied the FCC the authority to issue rules that bind state commissions in setting prices in arbitrations, the FCC still would have not only the authority, but the statutory duty, to interpret the federal statutory pricing requirements in applying § 271(c)(2)(B)'s "competitive checklist" and to consider a BOC's pricing practices in determining whether its entry into the long-distance market would satisfy § 271(d)(3)(C)'s separate "public interest" test.

a. There is no textual basis for the Eighth Circuit's contrary conclusion. Section 271 requires the FCC to "find[]," before granting long-distance authority, that the BOC is providing access and interconnection "in accordance with the [pricing] requirements of §§ 251(c)[] and 252(d)[]" and that the BOC's entry will be in the "public interest." *See* 47 U.S.C. §§ 271(d)(3), 271(c)(2)(B), 271(d)(3)(C). In making these determinations, the FCC must give "substantial weight" to the recommendations of the Department of Justice (§ 271(d)(2)(A)), but it is required merely to "consult with"

the pertinent state commission (§ 271(d)(2)(B)). These provisions foreclose the notion that the FCC must give preclusive effect in § 271 proceedings to state commission determinations on these issues.

The Oppositions contend that the competitive checklist merely "incorporates by reference" § 252(d). But § 252(d) is entitled "Pricing Standards," and, as the States acknowledge (NARUC, pp. 5-6), it is those substantive "pricing standards" that are incorporated in the checklist. For purposes of § 271, the FCC's responsibility to "find" that the BOC's prices satisfy those standards necessarily includes the authority to interpret those standards.

In this regard, the language authorizing the FCC to determine whether a BOC has satisfied the statutory requirements for long distance entry is virtually identical to the language authorizing federal district courts to review state arbitration decisions.[1] The judicial review provision thus "incorporates by reference" § 252 in the same way as does § 271. However, as the States concede (NARUC, p. 6 n.8), federal district courts under § 252(e)(6) determine whether the resulting agreement complies with the substantive standards set forth in the Act; they are not charged with the purely clerical task of checking to see if LECs are complying with state commission orders. There is likewise no conceivable basis for reading the same authorizing language in § 271 to

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[1] *Compare* §§ 271(c)(2)(B)(i, ii, xiv) (FCC must determine whether the BOC is offering access and interconnection "in accordance with the requirements of §§ 251(c)[] and 252(d)[]") *with* § 252(e)(6) (district courts must determine whether the terms of the arbitrated agreement"meet[] the requirements of section 251 . . . and this section [252]").

relegate the FCC to performance of that essentially clerical task.

The States' position therefore rests not on the incorporation of § 252 within the competitive checklist of § 271, but on the assertion that the States have "exclusive authority to interpret" the pricing standards of § 252 in all proceedings under the Act. NARUC, p. 6. Such an argument simply assumes its conclusion. No provision of the Act grants the States "exclusive authority to interpret" the Act's pricing requirements in all proceedings, and the Eighth Circuit's prior decision did not even consider whether the States had such authority under § 271, for the issue was not then presented. To the contrary, the only issue before the Eighth Circuit in the prior decision was whether the FCC had the authority to issue pricing rules that would bind state commissions exercising their authority under the Act to conduct arbitrations. In holding that the FCC did not have such authority, the Eighth Circuit relied on § 252(c) -- which is entitled "Standards for Arbitration," and which addresses only what States must do "[i]n resolving by arbitration" open issues between the parties to a prospective interconnection agreement. See 47 U.S.C. § 252(c); *Iowa Util. Bd.* v. *FCC*, 120 F.3d 753, 794-796 (8th Cir. 1997). By contrast, § 271 expressly assigns responsibility for proceedings on long-distance entry to the FCC.

Indeed, presumably recognizing that § 271's requirement that the FCC make findings that a BOC has complied with § 252(d) cannot be reconciled with the suggestion that the FCC has no independent role in that area, the LECs attempt to preserve the semblance of such a role by disingenuously suggesting (LECs, pp. 14-15) that the FCC still has the "ultimate responsibility" to determine whether the BOC is in

compliance with the state commission orders. As the BOCs themselves have elsewhere made abundantly clear, however, that is no role at all.[2]

The Eighth Circuit similarly erred in artificially limiting the separate "public interest" test that the FCC is required to apply under § 271(d)(3)(C). The FCC, like numerous other federal administrative agencies, has been required to make "public interest" determinations about market entry since long before the 1996 Act, and it is settled law that such inquiries "require consideration of all important consequences including anticompetitive effects." *Denver & Rio Grande W.R.R.* v. *United States*, 387 U.S. 485, 492 (1967); *see also FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 94 (1953). Indeed, even if the AT&T Consent Decree and § 271 had never existed, the FCC would still have been required under the Communications Act of 1934 to determine whether a BOC's entry into the long-distance market would be in the "public interest" before such entry would be authorized. *See* 47 U.S.C. § 214. And under any "public interest" inquiry, if a BOC is charging excessive prices for access and interconnection that enable it to maintain its local monopoly and to leverage that monopoly in the long-distance market, the FCC not only may, but must, take that into account in

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[2] *See, e.g.*, Reply Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 97-231 (filed Dec. 19, 1997), p. 23 ("the Louisiana PSC's express determination that BellSouth's rates satisfy the Act leaves no federal issue for the [FCC] to decide"); *see also* Pet. App. 12a (the Act "contemplate[s]" the FCC "simply asking the state commission whether the applicant BOC has complied with the state commission's pricing rules").

assessing the effect of the BOC's entry on the public interest. The LECs' only response is to claim (LECs, pp. 16-17) that such an inquiry would impermissibly "extend" the checklist. That response is insubstantial. It cannot constitute an impermissible extension of the checklist for the FCC to conduct the very public interest inquiry that the Act imposes as a separate and independent precondition for BOC long-distance entry.

b. Contrary to the positions expressed in the Oppositions, application of § 271 as written infringes no legitimate interests of the States. States never had any role prior to the 1996 Act in determining whether a BOC had satisfied the conditions necessary for entry into the overwhelmingly interstate long-distance market, and the only role granted them by § 271 of the Act is to be included in a non-binding consultation with the FCC. Nor does a State have the right or the power to require that every price charged for access and interconnection within its borders comply with its interpretation of §§ 251 and 252. To the contrary, as the LECs note (LECs, p. 3), the Act permits "private carrier-to-carrier negotiations to establish the rates" and, where such negotiations lead to agreements, a State may *not* disapprove them for failing to comply with its interpretation of the Act.[3] A BOC and a competitor may thus agree to prices set under the FCC's methodology without trenching upon (or even implicating) any conceivable understanding of the scope of state jurisdiction to arbitrate disputed issues. Therefore, even if § 252 expressly prohibited the FCC from adopting rules to

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[3] *Compare* § 252(e)(2)(B) (State may reject arbitrated agreement for failing to comply with §§ 251 and 252) *with* § 252(e)(2)(A) (State may reject negotiated agreement only if it is discriminatory or contrary to the public interest).

bind state arbitrations (as it does not), that prohibition would not prevent the FCC from conditioning long-distance entry on negotiated agreements that include such terms.

It is thus nonsense to suggest (LECs, p. 6) that the FCC has left state commissions with no authority over prices or has sought to "trump State pricing jurisdiction." Any usurpation here is in the opposite direction. Under the Act, a state commission is free to set effective prices for local exchange service in arbitrating disputes over interconnection agreements. A state commission simply may not insist that those pricing decisions also control critical aspects of long-distance entry decisions, thus "trumping" the authority expressly granted to the FCC and creating up to 50 different interpretations of a single federal statutory entry standard.

2. As our Supplemental Brief explained, the D.C. Circuit's decision in *SBC Communications, Inc.* v. *FCC*, No. 97-1425, 1998 U.S. App. Lexis 5276 (March 20, 1998) (Silberman, J.), directly conflicts with the reasoning of the Eighth Circuit. The LECs purport to distinguish *SBC Communications* solely by pointing out (LECs, p. 17) that the D.C. Circuit did not specifically discuss whether the FCC is obliged to defer to state commissions' "pricing policies" in ruling on § 271 applications. Their point is true but immaterial. *SBC Communications* broadly held that, in addressing § 271 applications, "the statute does not require the FCC to give the State commissions' views any particular weight." Rather, the FCC must "conclude[] to its own satisfaction that the applying BOC has satisfied . . . the [] statutory requirements." Slip Op. at 12-13. That holding, by its terms, covers all statutory requirements for § 271 authorization, including both the pricing requirements that are part of the competitive checklist and the public interest test.

Indeed, the BOCs unsuccessfully made precisely the same legal argument to the D.C. Circuit that they successfully made to the Eighth Circuit. The issue in *SBC Communications* was whether SBC faced a facilities-based local competitor in Oklahoma. SBC contended that because the issue of whether another carrier had entered the local market was within the exclusive responsibility of the State under § 2(b) of the Communications Act, it was therefore "fence[d] off from FCC reach" even in the context of § 271 proceedings. *See Louisiana Public Service Commission* v. *FCC*, 476 U.S. 355, 370 (1986). The court flatly rejected the claimed relevance of § 2(b) and *Louisiana* to § 271, explaining that "Congress has clearly charged the FCC, and not the State commissions, with deciding the merits of the BOCs' requests for interLATA [long distance] authorization, and interLATA service is typically *interstate*." Slip Op. at 13 (emphasis in original). That holding is irreconcilable with the Eighth Circuit's conclusion that because it had previously held that § 2(b) leaves pricing issues in arbitrations to the States for purposes of local competition, the FCC therefore must likewise treat state pricing determinations as conclusive for purposes of applying the statutory entry test for long-distance service.

Because the D.C. Circuit has exclusive jurisdiction to review the FCC's determinations on § 271 applications, its conflict with the Eighth Circuit's writ has the potential to create extraordinary difficulties for the FCC and the industry in future § 271 proceedings. This conflict concerning the FCC's authority under § 271 strongly supports immediate review in this case.[4]

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[4] This situation also graphically illustrates why the Eighth (continued...)

3. Finally, the LECs suggest that the Court should not be concerned about the prospect that it may have to address the important question of the FCC's authority under § 271 in the context of an emergency stay application, perhaps while review of *Iowa Utilities Board* is pending. The LECs' first contention is that an emergency stay application is no more likely if this petition is held than if it is now granted. That statement is plainly wrong. As described in our petition, the issue of the FCC's authority independently to make pricing decisions in § 271 proceedings may by early 1999 become decisive in determining whether individual applications are granted or denied. *See* Pet. 25-26. Accordingly, if the petition is not granted and consolidated with *Iowa Utilities Board* for review, the § 271 issue is much more likely to come to the Court through an emergency application.

The LECs' second response to the prospect of initially deciding this issue through an emergency stay proceeding is "so what?" The LECs note (LECs, p. 11) that the Court is "amply equipped" to decide stay motions. But our concerns are genuine and significant. Numerous § 271 applications are expected to be filed in the next year and a half. Congress required expedited treatment of these applications, and mandated prompt agency action under a 90-day deadline.

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[4] (...continued)
Circuit's assertion of jurisdiction to issue the writ of mandamus cannot have been correct. Sections 402(b)(6) and (9) of the Act vest exclusive jurisdiction to review the FCC's § 271 decisions in the D.C. Circuit. The Act contemplates that the D.C. Circuit will develop a unified, coherent body of law for the FCC to apply in § 271 proceedings. The Eighth Circuit's intrusion into that process severely disrupts the statutory scheme.

See § 271(d)(3). But the FCC and the industry are now confronted with an Eighth Circuit order requiring the FCC to defer to state commission pricing decisions in ruling on § 271 applications and with a decision of the D.C. Circuit (which has exclusive jurisdiction to review § 271 decisions) interpreting § 271 to require the FCC to make its own independent judgment whether § 271's requirements have been met. It would best further Congress' intent, and be most efficient for the Court, to resolve this conflict in advance of the flood of applications, at the same time the Court addresses the other two decisions in *Iowa Utilities Board*. By contrast, there is no basis to believe that any legitimate interest will be served by instead addressing this important issue in the abbreviated context of a stay application.

Respectfully submitted,

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